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6 IN THE UNITED STATES DISTRICT COURT

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10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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CHEVRON U.S.A., INC.,

No. C 05-03276 WHA

12

Plaintiff,

13

v.

**ORDER GRANTING IN PART  
AND DENYING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

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SSD & ASSOCIATES,

Defendant.

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16 **INTRODUCTION**

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In this declaratory judgment action, plaintiff Chevron U.S.A., Inc., moves for summary judgment. Plaintiff Chevron and defendant SSD & Associates had a franchise agreement by which defendant operated a Chevron-brand service station. Chevron claims SSD seriously breached the agreement, entitling Chevron to terminate the franchise. SSD did breach material terms of the agreement. There are, however, material issues of fact as to whether those breaches were serious enough to warrant termination. For this reason, summary judgment on Chevron's entitlement to terminate the franchise is **DENIED**. The complaint also requested a judgment that SSD breached material terms of the franchise agreements. Defendant concedes this point. The motion on this issue therefore is **GRANTED**.<sup>1</sup>

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<sup>1</sup> In the complaint, plaintiff also asked for a judgment requiring defendant to surrender the service station to plaintiff by November 8, 2005. Time has made this issue moot. Plaintiff also requested an award of attorney's fees and costs. It did not, however, pursue this issue in its motion for summary judgment.

**STATEMENT**

Plaintiff and defendant entered into a series of agreements to govern the franchise relationship by which defendant operated a Chevron-brand service station in San Ramon from October 1, 2002, through September 30, 2005. The agreement required SSD to pay rent based in part on its sales volume. Chevron and SSD also agreed that the dealer would use a computer system to collect sales data from the cash registers and automatically deliver it to Chevron via satellite. To give Chevron a way to double-check the accuracy of the electronic data, the agreement required SSD to maintain certain business records and to allow Chevron to audit them (Phelps Decl., Exh. A (Dealer Lease, Optional Temporary Partial Rent Waiver and Electronic Transaction Authorization Agreement, Dealer Supply Contract (Lessee Dealer), RAN System Amendment to Dealer Lease, various ancillary agreements, and amendments) (collectively, the “agreement”)).

In a letter delivered August 9, 2005, Chevron notified defendant that it would terminate the franchise in ninety days (Phelps Decl., Exh. B (Not. of Termination) and Exh. D (Dhillon Dep. (Apr. 6, 2006) (acknowledging receipt of notice on Aug. 9, 2005). The notice stated that, during an audit, defendant had failed to produce the following documents for 2002 to 2004: (1) purchase journals summarizing food mart inventory purchases, (2) financial statements, and (3) income tax returns (Phelps Decl., Exh. B). It claimed that the failure to produce these records was a violation of section 4(d) of the Dealer Lease. Section 4 of the Dealer Lease is entitled “RENT.” Subsection (d) provides that:

In order to confirm Dealer’s performance of Dealer’s obligations under the Lease, Chevron shall have the right . . . to audit all books and records relating to Dealer’s operation of the Premises . . . . Dealer shall within the time specified in [the audit notice] produce such books and records for inspection and/or copying by Chevron. Dealer shall maintain such books and records relating to Dealer’s operation of the [gasoline station] as may be specified by Chevron from time to time in Chevron’s Rental Accounting Guide . . . . Dealer acknowledges receipt of Chevron’s Rental Accounting Guide

(Phelps Decl., Exh. A). The stated purpose of the audit is thus to verify rent.

1 Two days after giving notice of the termination, Chevron filed its complaint in the  
2 instant action. Later, defendant created all the records that were missing and gave them to  
3 plaintiff (Dhillon Decl. ¶ 18).

## ANALYSIS

5 Summary judgment is proper where the evidence shows that “there is no genuine issue  
6 as to any material fact and that the moving party is entitled to judgment as a matter of law.”  
7 FRCP 56(c), (e). The nonmoving party has the burden of identifying with reasonable  
8 particularity the evidence that precludes summary judgment. *Keenan v. Allen*, 91 F.3d 1275,  
9 1279 (9th Cir. 1996). A genuine dispute as to a material fact exists if there is sufficient  
10 evidence for a reasonable finder of fact to return a verdict for the nonmoving party. On  
11 summary judgment, the “evidence of the non-movant is to be believed, and all justifiable  
12 inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,  
13 255 (1986).

14           Termination of a gasoline-station franchise is governed by Title I of the Petroleum  
15       Marketing Practices Act, as amended, 15 U.S.C. 2801–2806. The Act was adopted to protect  
16       “franchisees from arbitrary or discriminatory termination . . . of their franchises. [A]s remedial  
17       legislation, the Act must be given a liberal construction consistent with its goal of protecting  
18       franchisees.” *Khorenian v. Union Oil Co. of Cal.*, 761 F.2d 533, 535 (9th Cir. 1985) (internal  
19       citations and quotation marks omitted).

20 The Act bars refiners and distributors from terminating franchises except under certain  
21 circumstances. 15 U.S.C. 2802(a). One of these is the “failure by the franchisee to comply  
22 with any provision of the franchise,” so long as the provision “is both reasonable and of  
23 material significance to the franchise relationship.” 15 U.S.C. 2802(b)(2)(A). A “failure” to  
24 comply, however, has a limited definition under the statute. “The term ‘failure’ does not  
25 include . . . any failure which is only technical or unimportant to the franchise relationship . . . .”  
26 15 U.S.C. 2801(13)(A). Therefore, a refiner or distributor only can terminate an agreement if  
27 (1) the franchisee’s breach is more than merely technical and (2) the breach was important to  
28 the “franchise relationship.” As the Ninth Circuit put it: “[i]n making determinations in

1 franchise termination cases under the [Petroleum Marketing Practices Act], we look not only at  
2 the nature of the provision allegedly violated, but also at the nature and effect of the alleged  
3 breach.” *Khorenian*, 761 F.2d at 536.<sup>2</sup>

4 Chevron cites *DiNapoli v. Exxon Corp.*, 549 F. Supp. 449, 453 (D. N.J. 1982), for the  
5 proposition that the “focus of section 2802(b)(2)(A) is the reasonableness of the contract  
6 provision, not of the franchise termination” (Br. 8). In fact, the Ninth Circuit and Congress  
7 effectively require an inquiry into the reasonableness of the termination. A court assessing the  
8 propriety of termination under section 2802(b)(2)(A) must decide whether the breach was  
9 significant enough to warrant ending the franchise. Termination is improper if the breach was  
10 not serious. In other words, the franchisor’s reaction must be proportionate to the breach. A  
11 finding that they were proportionate is tantamount to holding that the termination was  
12 reasonable. A finding to the contrary is, for all practical purposes, a holding that the  
13 termination was unreasonable. *DiNapoli* does not make this point clear. To the extent  
14 *DiNapoli* contradicts binding Ninth Circuit precedent, it is rejected.

15 This order turns first to Chevron’s claim that it is entitled to a judgment that defendant  
16 breached material terms of the franchise agreements. After that, it considers the requested  
17 judgment that Chevron is entitled to terminate the franchise.

18 **1. BREACH OF MATERIAL TERMS OF FRANCHISE AGREEMENTS.**

19 Chevron claims that defendant violated section 4(d) of the Dealer Lease. Defendant  
20 “does not dispute that . . . it did not have all of the required business records at the time of the  
21 examination” (Opp. 9). By this statement and others, defendant concedes that it breached  
22 section 4(d) of the Dealer Lease by failing to produce the records at the appointed time. This  
23 order therefore considers the breach of the agreement as conceded.

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26 <sup>2</sup> Termination also is proper if it is reasonable, based on some event that is relevant to the franchise  
27 relationship. 15 U.S.C. 2802(b)(2)(C). Such events include fraud or crime by the franchisee, or failure by the  
28 franchisee to comply with federal, state or local laws or regulations, provided such actions or laws are relevant  
to the operation of the gas station. 15 U.S.C. 2802(c)(1), (c)(11). Although this justification for ending the  
franchise was given in the termination notice, Chevron is not pursuing it in the instant motion.

1       The next question is whether the provisions that defendant violated were “material” to  
2 the overall agreement. Throughout its opposition brief, defendant claims repeatedly that its  
3 *breach* of the agreements was not material (Opp. 2). Nowhere does defendant claim that the  
4 *provisions* that it violated were immaterial to the agreement generally. Defendant thus  
5 concedes that the provisions it violated were material. Plaintiff therefore is entitled to summary  
6 judgment on this issue.

7       **2. PLAINTIFF’S ENTITLEMENT TO TERMINATE THE FRANCHISE.**

8       Defendant argues that the instant motion must be denied because there are “genuine  
9 issue[s] as to [] material fact[s],” FRCP 56(c). The material facts allegedly in dispute are  
10 whether defendant’s failure to produce the documents on time was sufficiently important to  
11 justify terminating the franchise, despite defendant’s late delivery of the documents to plaintiff.  
12 In support of this argument, defendant produced a declaration by Surinder Dhillon, its chief  
13 executive officer, in which he stated that, after the audit, defendant prepared all the missing  
14 documents using valid source material, such as cancelled checks and purchase invoices, then  
15 provided the documents to Chevron (Opp. 18). He stated:

16       In September 2005, SSD provided the required tax returns to  
17 Chevron, in October 2005, SSD provided Chevron the requested  
18 financial statements and in December 2005, SSD provided  
19 Chevron with the food mart purchase journals. . . . [T]he numbers  
20 used for these reports did not come from Mr. Oseguera’s [the  
21 Chevron auditor’s] report. Instead, these reports were prepared  
from the source documents [][(i.e., journal tapes, end of shift Z-  
reports, end of day Z-reports, cancelled checks, purchase invoices,  
bank records, contemporaneous back office computer reports and  
department and group reports[])] . . . that would be the basis for  
such reports even when they are prepared currently

22 (Dhillon Decl. ¶ 18).

23       This evidence only can be evaluated properly in light of the reason why defendant was  
24 required to maintain the records and produce them for audits. Chevron conducted audits to  
25 confirm that dealers were paying enough rent. Rent was based on each dealer’s sales (Phelps  
26 Decl., Exh. A (Dealer Lease, Section 4(d); Optional Temporary Partial Rent Waiver and  
27 Electronic Transaction Authorization Agreement)). Without being able to determine if the  
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1 electronic sales figures reported to plaintiff were correct, it had no way of verifying that proper  
2 rent was being paid. Plaintiff underscores this purpose in its brief:

3 Because the system relies on self-reporting by Defendant, the  
4 Dealer Lease requires Defendant to maintain contemporaneous  
5 financial records of its operations, to give Chevron a way to verify  
6 that sales have been properly reported. The Dealer Lease also  
7 gives Chevron the right to audit those records, to make sure  
8 Defendant is in compliance with its obligations under the  
9 Lease. . . . [T]he requirement that Defendant keep  
10 contemporaneous records of its sales and make them available for  
11 audit permits Chevron to verify that the station's sales were  
12 properly reported and, therefore, the proper rent was charged

13 (Br. 3, 10 (internal citations omitted)).

14 On the instant motion, all evidence produced by defendant must be credited and all  
15 justifiable inferences in its favor must be made. *See Anderson*, 477 U.S. at 248, 255. The  
16 Dhillon declaration therefore must be accepted as proving that although defendant gave plaintiff  
17 the records late, the documents eventually were created using valid data, resulting in disclosure  
18 to Chevron of the required records. Based on this evidence, the Court at trial justifiably could  
19 conclude that Chevron eventually was able to verify rent amounts and suffered no significant  
20 harm as a result of the delay. The ability to verify rent is, after all, the very purpose of the audit  
21 and recordkeeping requirements. If the Court at trial were to conclude that Chevron suffered no  
22 significant harm, it also could conclude that the breaches were unimportant to the franchise  
23 relationship and therefore did not justify termination.

24 Of course, it is conceivable that Chevron could point to enough evidence to make these  
25 inferences in SSD's favor unreasonable. Chevron then would prevail on the instant motion.  
26 Chevron has submitted evidence that the records produced were deficient in certain respects.  
27 This evidence, however, is not so strong as to make it unreasonable for a finder of fact to infer,  
28 at trial and from Mr. Dhillon's testimony, that the lapses were not serious enough to undermine  
the franchise relationship.

29 Plaintiff points to the following evidence in support of its contention that the "records  
30 Defendant ultimately provided were worthless to verify the sales data" that previously had been  
31 reported automatically (Reply Br. 8).

1       First, there are two income statements for 2004 (Br. 15–16, Reply Br. 8–9).<sup>3</sup> One was  
2 provided to plaintiff by defendant’s counsel. The other was provided by defendant’s tax  
3 preparer (Ray Decl. ¶¶ 26, 32). There are differences between the statements. This raised a red  
4 flag that defendant might be maintaining double books in an attempt to defraud plaintiff. The  
5 Court held an evidentiary hearing at which plaintiff’s bookkeeper and tax preparer, a certified  
6 public accountant, both testified. They both testified that one version of the income statement  
7 was a draft prepared by the bookkeeper and that the second was the final version submitted to  
8 the Internal Revenue Service after revisions by the tax preparer. This testimony was supported  
9 by a declaration submitted by the bookkeeper (Davis Decl. ¶ 3). The testimony and the  
10 bookkeeper’s declaration create, at least, a material issue as to whether the differences between  
11 the two versions cast suspicion on their reliability, or are merely the result of fine-tuning by the  
12 CPA.

13       Plaintiff objects to the bookkeeper’s statement that “it is a common practice for the CPA  
14 to make adjustments to finalize the tax returns.” Plaintiff contends this statement lacked  
15 foundation because the bookkeeper stated she was not a CPA yet rendered “an opinion  
16 regarding ‘common practice[s]’ followed by CPAs” (Pl.’s Objections to Evidence Submitted by  
17 Def. at 4). The bookkeeper’s statement did not refer to common practice among CPAs  
18 generally. She referred only to the common practice of the CPA who prepared defendant’s tax  
19 returns. She had a foundation to make this statement because she worked with that particular  
20 accountant. The objection is overruled. Plaintiff also objects that the evidence is an improper  
21 opinion in violation of FRE 701 and 702. The bookkeeper’s statement was not an opinion. It  
22 was a statement of a fact that she observed personally. These objections also are overruled.<sup>4</sup> In  
23 any case, the live testimony standing alone was enough to raise a triable issue of material fact.

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26       <sup>3</sup> Plaintiff argued that there were two distinct income statements both for 2003 and for 2004. Only one  
27 income statement for 2003, however, was submitted into evidence with the motion. The argument about the  
2004 statements is therefore unavailing. If plaintiff introduced it into evidence at the hearing, that was too late  
because it failed to give defense counsel any time to prepare a response.

28       <sup>4</sup> Plaintiff objects to evidence not mentioned in this order. The results of this order are based only on  
evidence mentioned in it. All objections to evidence not mentioned here are therefore moot.

1        *Second*, Chevron claims that the “order in which the documents were produced is  
2 inherently suspicious” (Reply Br. 9). Even if the order in which the documents were produced  
3 is suspicious, the Dhillon declaration meets this objection by stating that the documents were  
4 created from underlying source documents such as cancelled checks. His statement thus might  
5 give rise to a reasonable inference that the documents were reliable. The order in which the  
6 documents were produced does not overcome this inference.

7        *Third*, Chevron alleges that the “balance sheets are wrong and contain suspicious,  
8 unexplained entries” (*ibid*). Plaintiff’s expert states that 2002 retained earnings were  
9 miscalculated on a balance sheet, although he states that it “is unknown at this time how this  
10 number was calculated.” The same expert reports another apparent miscalculation that resulted  
11 in retained earnings for 2003 being underreported to the IRS by \$106. If this miscalculation  
12 were fixed, “the balance sheet would not balance” (Ray Decl. ¶¶ 34–35). As the expert  
13 conceded, the first discrepancy is of unknown origin. It is therefore of limited value in  
14 undercutting the reasonableness of inferring, based on Mr. Dhillon’s testimony, that defendant’s  
15 documents eventually were produced properly. The second discrepancy, of \$106, is too small  
16 to carry plaintiff’s burden.

17        *Fourth*, Chevron notes that defendant’s books contain a reference to a “suspense  
18 account” containing more than \$1 million for each year from 2000 to 2004 (Reply Br. 9; Ray  
19 Decl. ¶ 37). Plaintiff’s expert stated that a suspense account is normally temporary. He called  
20 its long and consistent balance “quite extraordinary” (Ray Decl. ¶ 37). Defendant provided no  
21 explanation for this fact. As an initial matter, the contents of the records from 2000 and 2001  
22 are irrelevant, because the only stated basis for termination was the missing records for 2002 to  
23 2005. Furthermore, given that all justifiable inferences on the instant motion must be drawn in  
24 defendant’s favor, the unusual nature of the suspense-account item on the 2002 through 2005  
25 balance sheets does not, in and of itself, render unreasonable the inferences that may be based  
26 on the Dhillon declaration.

27        *Fifth*, Chevron claims that defendant’s balance sheets from 1999 to 2004 “claim  
28 inconsistent costs for fixtures and equipment[,] and depreciation expenses in excess of 100% of

1 the cost of the fixtures and equipment" (Reply Br. 9). The first inconsistency was in 1999 alone  
2 (Ray Decl. ¶ 36). The termination of the franchise was based only on the failure to produce  
3 documents covering 2002 through 2005 (Phelps Decl., Exh. B (Not. of Termination)). Plaintiff  
4 provides no reason why a discrepancy from 1999 is relevant. Furthermore, Chevron's Rental  
5 Accounting Guide only requires retention of documents for three calendar years (Phelps Decl.,  
6 Exh. C (Rental Accounting Guide at 4-7)). As to the depreciation exceeding the cost of the  
7 fixtures and equipment, the difference is just \$5,743 (Ray Decl. ¶ 37). This amount is too small  
8 for it to overcome the justifiable inference, based on Mr. Dhillon's declaration, that the  
9 documents defendant produced were reliable enough to allow proper calculation of rent owed.

10 *Sixth*, plaintiff notes that the ending value of the gas station's inventory for each year  
11 was identical for 2002 through 2004 (Reply Br. 9; Ray Decl. ¶ 30). Plaintiff casts this  
12 consistency as suspicious. SSD's bookkeeper states that the figures were "a[n] . . . estimate of  
13 the Station's closing inventory for 2002–2004" (Davis Decl. ¶ 5).<sup>5</sup> Any inquiry into whether  
14 the estimates were accurate and reliable enough to allow Chevron to verify the rent is a fact-  
15 intensive inquiry. The answer to this question is in legitimate dispute. The bare suspicions of  
16 Chevron's expert witness are therefore not enough to support a grant of summary judgment in  
17 its favor. This is particularly true in light of Mr. Dhillon's declaration, which permits the  
18 justifiable inference that the figures were reliable.

19 *Seventh*, plaintiff raises the contention that the "annual financial statements Defendant  
20 produced are no substitute for the monthly financial statements required" by the franchise  
21 agreement. Plaintiff argues that these annual statements are insufficient because rent is  
22 calculated on a monthly basis (Reply Br. 10). The only evidence that Chevron cites in support  
23 of this argument are sections 1(b)–(d) of the Optional Temporary Partial Rent Waiver and  
24 Electronic Transaction Authorization Agreement (Phelps Decl., Exh. A). None of these  
25 sections relate to recordkeeping. Instead, they address how rent is to be calculated.

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27 <sup>5</sup> The bookkeeper characterized her estimates as "reasonable" (Davis Decl. ¶ 5). Chevron objects to  
28 her characterization of the figures as "reasonable," on the ground that this statement lacks foundation and is  
improper opinion testimony (Pl.'s Objections at 4). This order assumes, without deciding, that these objections  
would be sustained. It therefore considers the evidence with the word "reasonable" stricken from the  
declaration.

1 Furthermore, plaintiff cites to no evidentiary support for its contention that SSD supplied it only  
2 with annual statements. These evidentiary deficiencies defeat this aspect of Chevron's motion.  
3 In addition, Chevron did not raise this issue until its reply brief. New issues may not normally  
4 be raised in a reply brief.

5 Even considered as a whole, Chevron's contentions about discrepancies and  
6 irregularities in defendant's records would not make it unreasonable for a finder of fact to find  
7 for defendant based on Mr. Dhillon's testimony. The Court at trial reasonably could reject  
8 plaintiff's objections as a potpourri of quibbles that would not undermine the franchise  
9 relationship enough to warrant termination. Chevron may, however, prove its case at trial. At  
10 this stage, however, there is a sufficient factual dispute to bar summary judgment on the issue of  
11 Chevron's entitlement to terminate the franchise.

12 Chevron also raises a legal argument related to the records that were produced late. It  
13 claims that defendant "has no right to cure its breaches" (Reply Br. 7). The dispositive issue,  
14 however, is not whether defendant cured breaches of the agreement. Instead, the issue is  
15 whether those breaches were significant enough to justify terminating the franchise. Under the  
16 Act, dealers do not need to cure unimportant and merely technical breaches of the franchise in  
17 order to avoid termination. If the breaches are that insignificant, termination is barred and any  
18 right to "cure" is a nonissue.

19 Chevron cites *Wisser Company, Inc. v. Mobil Oil Corp.*, 730 F.2d 54 (2d Cir. 1984). In  
20 *Wisser*, a gasoline dealer brought an action seeking to enjoin Mobil from completing  
21 termination of the franchise. Mobil had based its termination on the dealer selling non-Mobil  
22 gasoline under the Mobil trademark. A district judge denied a motion for a preliminary  
23 injunction, based on its findings that there was a probability that Mobil would be able to prove  
24 that the dealer was selling misbranded gasoline and that Mobil would succeed on the merits.  
25 The Second Circuit upheld the order, holding that "the district court's finding that Mobil  
26 probably would be able to show at trial that [the dealer] was 'passing off' the non-Mobil  
27 gasoline as Mobil gasoline is not clearly erroneous . . ." The dealer argued that the notice of  
28 termination was improper because it was not preceded by an earlier notice and by an

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1 opportunity to cure the breach. The Second Circuit held that there was no such right to an  
2 opportunity to cure under 15 U.S.C. 2802(b)(2)(A). *Wisser Co.*, 730 F.2d at 56–59. In the  
3 instant motion, Chevron justifies its termination on the same subsection of the Act. Beyond  
4 that, the similarities end. SSD makes a different contention than did the dealer in *Wisser*. SSD  
5 does not contend that it was entitled to an earlier notice and to an opportunity to cure before a  
6 notice of termination could be given. Instead, SSD contends that its breach never rose to the  
7 level of importance that would justify termination.

8       Chevron also cites *Reyes v. Atlantic Richfield Co.*, 12 F.3d 1464 (9th Cir. 1993), in  
9 support of its statement that “courts have repeatedly upheld terminations under the [Act] based  
10 on the dealer’s failure to maintain business records required by the franchisor (Br. 12). In  
11 *Reyes*, the Ninth Circuit held that three facts, collectively, justified nonrenewal of the dealer’s  
12 franchise: (1) the dealer stopped stocking the store with new merchandise, (2) the dealer let  
13 required insurance lapse and (3) defendant failed to keep and produce proper records on time.  
14 That decision, however, was distinguishable from the instant case in one crucial way: unlike  
15 SSD, the dealer in *Reyes* did not claim that the records were ever produced to Atlantic  
16 Richfield. He therefore made no argument that the net result was a mere delay, as opposed to  
17 an unmitigated failure to keep proper books. His only argument that termination was not proper  
18 under section 2802(b)(2)(A) was that it was motivated by racial discrimination. 12 F.3d at  
19 1468–69. *Reyes* is therefore not on point.

20       Chevron also cites to two district court orders. The first, in *Chevron, U.S.A. Inc. v.*  
21 *Gulessarian*, Bus. Franchise Guide (CCH) ¶ 11,975 (C.D. Cal. Nov. 22, 2000), is  
22 distinguishable because defendant produced nothing to contradict Chevron’s evidence that the  
23 dealer’s bookkeeping was improper. As the judge ruled:

24           Defendant argues that termination [under section 2802(b)(2)(A)]  
25           was not warranted because Plaintiff failed to provide Defendant an  
26           opportunity to produce the requested records ‘and filed the subject  
27           action in bad faith.’ Plaintiff correctly notes that the only evidence  
28           Defendant offers with respect to the audit is a declarant’s statement  
                 that the auditor spent one-and-a-half hours at the station on August  
                 17, 1999. This is wholly insufficient to support Defendant’s  
                 conclusory argument.

1 *Id.* (internal citations and footnote omitted). By contrast, SSD produced evidence that the  
2 documents it eventually delivered to Chevron were prepared using proper underlying data. A  
3 reasonable finder of fact could infer from this evidence that Chevron eventually could verify the  
4 rent and, therefore, that SSD's breaches were unimportant to the franchise. In addition, the  
5 judge in *Gulessarian* held that the termination was justified under section 2802(b)(2)(A) based  
6 on filing of false sales tax returns. *Id.* n.4. In the instant motion, by contrast, Chevron does not  
7 pursue this justification for termination of the franchise. In short, *Gulessarian* does not  
8 persuade the Court to grant Chevron's motion.

9        The other district court order was in *Nahabet v. Chevron U.S.A., Inc.*, Bus. Franchise  
10      Guide (CCH) ¶ 12,184 (C.D. Cal. Oct. 24, 2001). Like *Gulessarian*, *Nahabet* was a case over a  
11      dealer's unmitigated failure to provide important accounting documents to Chevron. As the  
12      judge in *Nahabet* noted, “[I]t is undisputed that the missing Z Reports [summary sales reports  
13      generated by the station's automatic sales-reporting system] were either discarded or never  
14      generated, and that Plaintiff never produced them; thus, Plaintiff was in no position to cure his  
15      breach.” *Id.* & n.2. *Nahabet* therefore is distinguishable from the instant case, in which SSD  
16      presents evidence that it eventually gave Chevron all the records it requested. Given this  
17      important difference between the instant case and *Nahabet*, that order does not persuade the  
18      Court to grant Chevron's motion.

## CONCLUSION

20 For the reasons stated, plaintiff's motion for summary judgment is **GRANTED** only as to  
21 whether defendant breached material terms of the agreement. In all other respects, including  
22 plaintiff's entitlement to terminate the franchise, the motion is **DENIED**.

24 || **IT IS SO ORDERED.**

26 | Dated: July 21, 2006

Wm. Alsup